STATE OF MICHIGAN

COURT OF APPEALS

RICHARD W. REMSING,

Plaintiff-Appellant,

V

DAVID HACKNEY, CONNIE HACKNEY, THOMAS BYERLEY, LISBETH BYERLEY, JAMES RUDRIK, EILEEN RUDRIK, DANIELS MCCABE, DEBBIE MCCABE, DARWIN SHUNK, WANDA SHUNK, BENJAMIN EMERY, BRIDGET EMERY, TONY GIANELLI, MICHAEL F. LEWIS, DCA BUILDING, LLC, and RIVER RUN ESTATES HOMEOWNERS ASSOCIATION,

Defendants-Appellees.

UNPUBLISHED
October 12, 2006

No. 259284
Eaton Circuit Court
LC No. 03-001584-CH

Before: Sawyer, P.J., and Wilder and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order dismissing plaintiff's complaint. Plaintiff additionally challenges the trial court's decision denying his motion to amend his complaint. We reverse in part, affirm in part, and remand for further proceedings.

This case arises from a dispute over alleged non-compliance with deed restrictions in the River Run Estates Subdivision. Plaintiff and defendants, except for the River Run Estates Homeowners Association (the Association), are homeowners in River Run Estates. All of the homeowners are members of the Association who purchased their lots subject to a Declaration of Covenants and Restrictions, governing such things as lot setbacks and building materials. Plaintiff filed suit seeking an accounting from the Association and seeking equitable relief due to defendant homeowners' violations of certain deed restrictions.

After discovery had been completed, defendants moved to dismiss this suit on the basis that the covenants and restrictions had been amended such that plaintiff could no longer assert that defendants were not in compliance with the same. The trial court treated the motion as one for summary disposition, and granted it. Because the trial court relied on evidence beyond the scope of the pleadings in reaching its decision, we conclude that the trial court was acting pursuant to MCR 2.116(C)(10).

Appellate review of a motion for summary disposition is de novo. *Spiek v Transportation Dep't*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion made under MCR 2.116(C)(10) tests the factual support for a claim, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

Defendants argued, and the trial court apparently agreed, that the amendments to the deed restrictions "clarified" the drafter's intent concerning the minimum requirements for foundation coverage and exterior wall materials rendering the majority of plaintiff's claims "moot." We disagree.

In an action to enforce a negative covenant, the intent of the drafter is controlling. *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997). Because the deed restrictions are part of an agreement grounded in contract, *id*., a subset of the parties to the agreement cannot simply amend the language contained therein in order to "clarify" the drafter's intent. Rather, the parties' intent in entering a contract should be ascertained "by construing it in the light of circumstances existing at the time it was made[.]" *Klever v Klever*, 333 Mich 179, 186; 52 NW2d 653 (1952) (citations omitted). Because a third party (or parties) could not "clarify" the developer's intent and no evidence was presented to suggest the developer's intent with respect to the restrictions at issue, what actually occurred in this case was an amendment to the deed restrictions.

> Courts in this state and in other jurisdictions generally recognize that land use covenants containing restrictions such as reciprocal negative easements may include a clause giving the grantees or lot owners the power to amend, modify, extend or revoke the restrictions and that any such action taken by the property owners applies to all of the properties which are subject to the restrictions. [*McMillan v Iserman*, 120 Mich App 785, 790; 327 NW2d 559 (1982).]

Here, the declaration of covenants states that "changes can be made in these covenants at any time upon the recording of an instrument, signed by the then-Owners of eighty (80) percent of the Lots, agreeing to said changes." Defendants presented evidence that the owners of 16 of the 19 lots in the subdivision (84.21 percent) agreed to the amendments, and asserted that the amendments would be recorded after the owners of two of the lots who had not signed onto the amendments other than plaintiff were given an opportunity to do so. However, because no evidence was presented that the amendments were actually recorded, they were not effective under the language of the declaration of covenants, pursuant to which changes are effective only "upon the recording of an instrument." Thus, we conclude that the trial court erred in granting summary disposition in favor of defendants on the basis of the unrecorded changes to the declaration of covenants. Because the changes may, by the time this opinion is issued, have been recorded, we remand to the trial court for a new hearing to inquire as to the recording of the amendments. If there is a finding the amendments have been recorded, plaintiff's claims are, in fact, moot, as he agreed to be bound by the declaration of covenants permitting modifications to the restrictions.

Plaintiff further complains that the trial court permitted defendants to file their motion for summary disposition after the court-imposed deadline for dispositive motions. MCR 2.401(B)(2)(a)(iii) specifically grants the trial court the power to limit the period for the completion of discovery through a scheduling order when it "concludes that such an order would facilitate the progress of the case." The scheduling order issued in this matter permitted extensions by the court and it is apparent that the court concluded an extension was warranted where the amendment to the covenants had just been approved by the requisite number of homeowners. The trial court specifically noted that it had the latitude to shorten the timeframe set forth in the scheduling order and that it did so, further noting that because the motion was adjourned from its originally scheduled date, plaintiff had 21 days notice of the hearing. Given the above, the trial court did not abuse its discretion in permitting the late motion. See, e.g., *Kemerko Clawson LLC v RXIV Inc*, 269 Mich App 347, 349; 711 NW2d 801 (2005).

Plaintiff also asserts that the trial court erred by permitting defendants to raise the amendment of the covenants as a defense without first raising the same defense in a responsive pleading pursuant to MCR 2.111(F). An affirmative defense is "a defense that does not controvert the plaintiff's establishing a prima facie case, but that otherwise denies relief to the plaintiff. . . In other words, it is a matter that accepts the plaintiff's allegation as true and even admits the establishment of the plaintiff's prima facie case, but that denies that the plaintiff is entitled to recover on the claim for some reason not disclosed in the plaintiff's pleadings." *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993).

Here, the defense at issue is an affirmative defense because even if the allegations in plaintiff's complaint were true, plaintiff would not be able to obtain the equitable relief sought if the amendments were found valid. Thus, the amendments constitute a defense that denies plaintiff's right to prevail for reasons not disclosed in plaintiff's complaint. *Stanke, supra.* In this case, the trial court indicated that it would have granted leave to defendants to amend their responsive pleading in order to assert the amendments as a defense, but decided that doing so was not necessary because it would only prolong the proceedings and unnecessarily increase the costs to the parties.

While we understand the court's rationale, MCR 2.111(F)(3) requires that affirmative defenses "must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118." MCR 2.118 does permit untimely amendments when justice requires. However, amendments to pleadings "must be filed in writing . . . ." MCR 2.118(A)(4). Because these provisions are mandatory, the trial court erred by not requiring that defendant's amend their pleadings to reflect this added defense. The trial court may, however, address this issue on remand.

Finally, plaintiff challenges the trial court's denial of his motion to amend his complaint. Plaintiff sought to amend his complaint to add at least one new party and raise new causes of action relating to unfair trade practices on the part of a real estate agency and/or agent in allegedly providing misleading or disparaging information about plaintiff and his real estate business. Plaintiff also sought to bring new allegations against one defendant for interference with the quiet enjoyment of his property, and to expand upon the previously pled deed restriction violations. The trial court reasoned that because the amendments to the complaint concerned a distinct set of facts outside the scope of the deed restriction violations the case originally dealt with, allowing the amendments would expand and cloud the original case and result in undue

delay. Accordingly, the court determined that although the motion to amend was timely filed under its scheduling order,[1] it would only allow amendment of the complaint to the extent the amendment added to or refined the deed restriction violation allegations. Plaintiff asserts that the trial court abused its discretion by concluding that adding the new defendants and claims would result in undue delay because discovery was not scheduled to be completed for nearly three months.

This Court reviews a denial of a motion for leave to amend a pleading for an abuse of discretion. *Franchino v Franchino*, 263 Mich App 172,189; 687 NW2d 620 (2004). An abuse of discretion occurs when "an unprejudiced person considering the facts upon which the decision was made would say that there was no justification or excuse for the decision." *City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 254; 701 NW2d 144 (2005).

"Motions to amend should be denied only for specific reasons such as '"[1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [and 5] futility . . . ."'" *Franchino, supra* at 189-190, quoting *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997); see also MCR 2.118(A)(2). Generally, "delay alone does not justify denying a motion to amend. However, 'a court may deny a motion to amend if the delay was in bad faith or if the opposing party suffered actual prejudice as a result.' Actual prejudice results when an amendment prevents the opposing party from receiving a fair trial." *Franchino, supra*, at 191 (citations omitted).

Here, plaintiff has provided no explanation why he waited until May 2004 to seek leave to amend his complaint to include the unfair trade practices allegations, where the amended complaint indicates that the allegedly unlawful trade practices began in May, 2002.[2] Thus, we conclude that the motion to amend was brought with undue delay. Further, the time required for serving the new defendants with process and allowing *sufficient* discovery on the new issues likely would have required the scheduled trial date to be postponed for a substantial amount of time. Accordingly, we conclude that the trial court did not abuse its discretion by refusing to grant plaintiff leave to amend his complaint. In this case, it cannot be said that the court's decision "'fall[s] outside this principled range of outcomes.'" *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003), quoting *City of Novi, supra*, 473 Mich 254.

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[1] MCR 2.401(B)(2) indicates that a court shall establish the time for the amendment of pleadings. Defendants assert that plaintiff's motion to amend was not *timely* filed because the court's scheduling order required such motions to be filed by May 1, 2004, but plaintiff's motion was not filed until May 3, 2004. However, May 1, 2004 was a Saturday. MCR 1.108 states that when the last day of a period of time allowed by the court rules falls on Saturday, the period runs until the end of the next business day.

[2] According to the dates on the photographic evidence submitted in support of plaintiff's claim for injunctive relief from Daniel McCabe's interference with the quiet enjoyment of his property, this claim also could have been brought at an earlier date.

We reverse the decision of the trial court granting summary disposition in favor of defendants, affirm the trial court's decision denying plaintiff's motion for leave to amend his complaint, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Kurtis T. Wilder
/s/ Deborah A. Servitto